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There is a duty on the shipowner toward all the shippers. He must weigh the conflicting interests represented by the various cargoes.<sup>7</sup> The master has a discretion to act for any one of the cargo-owners in the presence of impending danger on the theory that only he can decide what should be done in time to take immediate action.<sup>8</sup> In the present case, the directors had a better knowledge of the true state of facts than the master or the shippers, and the same reason for granting the discretion to them to weigh the conflicting interests would exist. The court apparently considered that if the master had acted with a true knowledge of the exact state of facts existent at the time of turning back, the shipper would have been excused.<sup>9</sup> If this is the assumption of the court, the result is strange. The principal would be exempt when the agent, acting on his own knowledge of the true state of facts, abandons the voyage, but would not be exempt when the agent, under the same circumstances, performed exactly the same act under orders from the principal.

**TAXABLE "NET INCOME" UNDER THE CORPORATION EXCISE TAX LAW OF 1909.**—The Federal Corporation Excise Tax Law of 1909 subjects every corporation (with enumerated exceptions) engaged in business in any state or territory of the United States to a special excise tax equivalent to one per cent. of the entire net income received during the year from all sources over and above \$5000.<sup>1</sup> It is of little importance for the purpose of this discussion to consider the various meanings of the term "income",<sup>2</sup> for the statute expressly defines the "net income" which is taxable as the remainder of the gross income after certain specified deductions. But in determining what is gross income, questions of some difficulty arise to which the statute furnishes no ready answer. Does the appreciation resulting from the sale of capital assets, such as realty or securities, constitute a part of gross income?<sup>3</sup> By the English decisions under income tax laws,

<sup>1</sup>New York & Porto Rico S. S. Co. v. Guanica Centrale (2 C. C. A. 1916) 231 Fed. 820; cf. Balfour Guthrie & Co. v. Portland & Asiatic S. S. Co. (D. C. 1909) 167 Fed. 1010; The Savona [1900] P. 252.

<sup>2</sup>Scrutton, *op. cit.* 232. In The Kronprinzessin Cecilie, the evidence showed that if the ship had pursued her course any further she would not have had enough coal to return to New York in case of necessity.

<sup>3</sup>This is assumed because the court debates so thoroughly whether the master exercised discretion or obeyed orders.

<sup>4</sup>36 Stat. 112, § 38. This statute, passed in order to avoid the effect of Pollock v. Farmers' Loan & Trust Co. (1895) 158 U. S. 601, 15 Sup. Ct. 912, which declared unconstitutional the Income Tax Law of 1894, was held constitutional as a tax on the privilege of doing business as a corporation. Flint v. Stone Tracy Co. (1910) 220 U. S. 107, 31 Sup. Ct. 342. Though it was repealed by the Income Tax Law of 1913, 38 Stat. 172, its provisions are substantially reenacted in the latter statute as a tax directly on income. An act of September 8th, 1916, has raised the tax to two per cent. Under the 1909 statute a corporation was not subject to the tax unless it was doing business, McCoach v. Minehill Ry. (1913) 228 U. S. 295, 33 Sup. Ct. 419, but since the 1913 Act taxes income, it makes no difference whether the corporation is doing business or not.

<sup>5</sup>Black, Income Taxes, § 32 *et seq.*

<sup>6</sup>Ordinarily, if stocks or bonds held in trust are sold at an increase, this increase as between life tenant and remainderman is principal, not income. Matter of Gerry (1886) 103 N. Y. 445, 9 N. E. 235; Graham's Estate (1901) 198 Pa. 216, 47 Atl. 1108.

the appreciation resulting from a sale of land or of securities is a part of gross income only if such sale is the business of the corporation.<sup>4</sup> In the United States, in spite of a decision of the Supreme Court which held that such an appreciation was not income but merely an increase of capital,<sup>5</sup> the Treasury Department has treated it as an item of gross income.<sup>6</sup> But in the recent case of *United States v. Guggenheim Exploration Co.* (D. C., S. D. N. Y. 1917) 56 N. Y. L. J. 1367, the court impliedly denied the validity of these regulations as applied to a sale of capital assets not in the ordinary business of the corporation; and held that the proceeds of such a sale were merely capital assets in a changed form.<sup>7</sup> Suppose there has been no sale of the capital assets but merely an appreciation in their value. Is this unearned increment an item of gross income? At first, the Treasury officials held that it was,<sup>8</sup> but they have revised that ruling and now declare that such an increase is to be accounted for as income only if the increased annual valuation has been entered on the books of the corporation.<sup>9</sup>

Further difficulties arise in a case where the capital assets which have been sold or which have increased in value were acquired before the law went into effect on January 1st, 1909. Where the lands or securities bought prior to the time of incidence of the tax are sold afterwards, if the increased value of the land has not been made a part of the returns for previous years as provided for by the regulations of the Treasury Department,<sup>10</sup> the profits arising from the sale should be prorated in accordance with the number of years the assets were held by the corporation and the number of years the law

<sup>4</sup>*Stevens v. Hudson's Bay Co.* (1909) 101 L. T. R. [N. S.] 96; Black, *Income Taxes*, § 45.

<sup>5</sup>*Gray v. Darlington* (1872) 82 U. S. 63.

<sup>6</sup>Treas. Dec. (Int. Rev.) 1571, Art. 2 (1909); T. D. 1742, §§ 43, 62, 85 (1911).

<sup>7</sup>For statement of facts, see p. 173. The court in its decision follows *Gray v. Darlington*, *supra*, which was also followed in *Industrial Trust Co. v. Walsh* (D. C. 1915) 222 Fed. 437 and *Gauley Mountain Coal Co. v. Hays* (4 C. C. A. 1915) 230 Fed. 110. The regulations are valid, however, in the case of a sale of capital assets in the ordinary business of the corporation. See *Stratton's Independence v. Howbert* (1913) 231 U. S. 399, 34 Sup. Ct. 136.

<sup>8</sup>T. D. 1606, § 40 (1909).

<sup>9</sup>T. D. 1742, §§ 48, 85 (1911). These regulations too must be considered in the light of *United States v. Guggenheim Exploration Co.*, *supra*, and the cases cited in note 6, *supra*. If there is no annual adjustment of these book values, the appreciation in value is not regarded as income till there has been a sale of the assets. T. D. 1742, §§ 48, 85 (1911). The Treasury Regulations in regard to the Income Tax Law of 1913 are substantially to the same effect. Regulations 1914, Art. 109, 111. But it is to be noted that the Income Tax Law of 1913, § IIB, reads (as the 1909 Act did not) " \* \* \* the net income of a taxable person shall include gains, profits, and income derived from \* \* \* sales or dealings in property, whether real or personal, growing out of the ownership or use or interest in real or personal property, also from any rent, dividends, securities \* \* \* ." This may be construed by the courts so as to tax the unearned increment. Black, *Income Taxes*, §§ 45, 47; but see Foster, *Income Tax*, § 33.

<sup>10</sup>T. D. 1742, §§ 48, 85 (1911).

was in effect.<sup>11</sup> A situation not contemplated by these Department Regulations arose in the recent case of *Doyle v. Mitchell Bros. Co.* (8 C. C. A. 1916) 235 Fed. 686. It was there held that where timber was cut and sold by a timber corporation on its land in 1909, the increase in value which accrued prior to 1909, though not entered on the books, was not taxable income.<sup>12</sup> That the statute taxes income arising after January 1st, 1909, is apparent from the regulations of the Treasury Department in regard to prorating.<sup>13</sup> The only purpose of prorating is to arrive approximately at the amount of gross income arising since January 1st, 1909, in a case where it is difficult or impossible to determine the value of assets on that day; but where, as in the case of *Doyle v. Mitchell Bros. Co.*, *supra*, the value of the capital assets on the 1st of January, 1909, is undisputed, there is no reason why that value should not be deducted from gross income in order to determine net income.<sup>14</sup> The values entered in the books of the corporation do not estop it from setting up the true values; such entries bind neither the government nor the corporation.<sup>15</sup>

THE SITUS OF SHARES OF STOCK.—In an action against a non-resident who is served by publication only, a judgment against him is valid merely in so far as it affects property of the defendant within the jurisdiction of the court.<sup>1</sup> If, then, a resident of one state, holding stock in a corporation incorporated in another state, is sued in the latter state, in an action involving title to the stock, the courts will acquire jurisdiction upon service by publication, where the defendant has no other property within the state, only if the stock is itself a *res* there. This question was recently presented to the New York Court of Appeals in the case of *Holmes v. Camp* (1916) 56 N. Y. L. J. 1033. In this case, the complainants were stockholders in both a domestic and a foreign corporation. The domestic corporation held stock in the foreign corporation, and the foreign in the domestic. This latter stock, held in the domestic corporation, had been conveyed by the foreign corporation to the testator of the individual defendant; and complainants, alleging the transfer to have been fraudulent, filed a bill in equity to compel restitution to the foreign corporation of the stock of the domestic corporation. The court held that an order

<sup>11</sup>T. D. 1742, §§ 62, 85 (1911). For instance, if the assets were purchased in 1905 for \$100,000 and sold in 1910 for \$150,000 the \$50,000 appreciation must be apportioned to the five years during which the assets were held, of which only one, 1909-1910, falls within the period during which the law was in force; one-fifth of \$50,000, or \$10,000, therefore, constitutes an item of gross income for 1909-1910.

<sup>12</sup>For statement of facts, see p. 173. Since the corporation made the sale in the ordinary course of its business, the increased value accruing subsequent to 1909 was properly regarded as a part of taxable income.

<sup>13</sup>T. D. 1571, Art. 2 (1909); T. D. 1742, § 62 (1911); *cf.* *Lynch v. Turkish* (8 C. C. A. 1916) 236 Fed. 653.

<sup>14</sup>The lumber manufactured before January 1st, 1909, and on hand on that day was, even by the regulations of the Treasury Department, capital assets, though in a changed form. T. D. 1606, § 76 (1910); T. D. 1675, § 75 (1911).

<sup>15</sup>*Baldwin Locomotive Works v. McCoach* (D. C. 1914) 215 Fed. 967; *cf.* *Bailey v. New York Cent. etc. R. R.* (1882) 106 U. S. 109, 1 Sup. Ct. 62.

<sup>1</sup>*Pennoyer v. Neff* (1877) 95 U. S. 714; *Cooley, Constitutional Limitations* (7th ed.) 579 *et seq.*